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Cover Page Footnote

J.D. Candidate, 2003 at Fordham University School of Law, B.S., Cornell University, 2000. I would like to thank Professor Fleming for his invaluable knowledge of constitutional theory as well as Gail Glidewell and Peter Acton for their insight and guidance. And of course I thank my family and friends without whose encouragement and support I would have never been able to come this far.

SEPTEMBER 11, 2001: THE CONSTITUTION DURING CRISIS: A NEW PERSPECTIVE

Lori Sachs*

INTRODUCTION

At 8:48 a.m. on September 11, 2001, the first of two hijacked planes crashed into the north tower of the World Trade Center in New York City. By 10:28 a.m., the worst attack on American soil had ended, but the nation had not yet begun to react.¹ Four flights had been hijacked that day: two crashed into the World Trade Center, one into the Pentagon, and one into a field in rural Pennsylvania.²

Almost immediately, officials placed the blame on Osama bin Laden³ and the al-Qaeda network.⁴ This was not the first time that

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2. See Nancy Gibbs, *If You Want To Humble an Empire*, TIME, Sept. 14, 2001, at 32 (providing a detailed description of the events of September 11, 2001).

Desks and chairs and people were sucked out the windows and rained down on the streets below. Men and women, cops and fire fighters watched and wept. As fire and debris fell, cars blew up; the air smelled of smoke and concrete, that smell that spits out of jackhammers chewing up pavement. You could taste the air more easily than you could breathe it.

Id.

3. See Serge Schemann, *U.S. Attacked; President Vows To Exact Punishment for 'Evil'*, N.Y. TIMES, Sept. 12, 2002, at A1. American Flight 11, a Boeing 767 en route from Boston to Los Angeles, crashed into the north tower of the World Trade Center. *Id.* United Airlines Flight 175, en route from Boston to Los Angeles, crashed into the south tower. Flight 77, a Boeing 757 flying from Washington's Dulles International Airport to Los Angeles, flew into the Pentagon. *Id.* United Airlines Flight 93, en route from Newark, New Jersey, to San Francisco, California, crashed in Somerset County, Pennsylvania. *Id.* 266 people were confirmed dead on the planes. *Id.* 184 were confirmed dead at the Pentagon. *A Nation Challenged; Dead and Missing*, N.Y. TIMES, Mar. 13, 2002, at A17. Approximately 3014 were confirmed dead or missing in the World Trade Center. *Id.*

4. On September 13, Secretary of State Colin Powell announced Bin Laden as the prime suspect in the attacks. See Bill Glauber, *Blair Outlines Evidence In Attacks; House of Commons Is Told Bin Laden, Al-Qaida Struck U.S.*, BALTIMORE SUN, Oct. 5, 2001, at A1. British Prime Minister Tony Blair publicly accused bin Laden of making the attack: "The attacks on 11 September bear all the hallmarks of a bin Laden operation: meticulous long-term planning; a desire to inflict mass casualties; a total

bin Laden and his associates had demonstrated their hatred for the United States.⁵ But this attack differed from previous terrorist incidents. Before September 11, 2001, Americans cared little about terrorism.⁶ Yet because the attack was on American soil, many Americans feared further terrorist attacks by people living within U.S. borders.⁷

In a speech delivered on September 20, 2001, President George W. Bush suggested that, despite the crisis, all efforts would be made to safeguard constitutional liberties: "We're in a fight for our principles, and our first responsibility is to live by them. No one should be singled out for unfair treatment or unkind words because of their ethnic background or religious faith."⁸

President Bush's remarks, however, do not represent the sentiment pervading the country since the attacks on September 11, 2001.⁹ His remarks have not calmed the fears of thousands of people living in the United States who are concerned that their rights will be infringed upon by legislation purporting to eliminate terrorism.¹⁰ This Comment addresses how the United States should re-

disregard for innocent lives, including Muslims; multiple simultaneous attacks; and the use of suicide attackers." *Id.* Further, intelligence reports indicate that bin Laden "told associates that he had a major operation against America under operation." *Id.*

5. Osama bin Laden and other Islamic fundamentalists have been extensively involved in numerous terrorist attacks involving Americans over the past decade. PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY* xiii (1998).

6. *Id.* Islamic Fundamentalists believe that radical action is necessary to bring society in line with the Qur'n, the biblical text of the Muslim tradition. *Id.* at xiii-xiv.

7. The FBI reports that from 1985 to 1995, there were only two international terrorist incidents on U.S. soil: the bombing of the World Trade Center in February 1993 and the occupation of the Iranian Mission to the United Nations in 1992. HEYMANN, *supra* note 4, at 1.

8. See, e.g., John Ashcroft, *A Clear and Present Danger*, *RESPONSIVE COMMUNITY*, Winter 2001-02, at 16. There have been numerous threats made of future attacks since September 11, 2001. *Id.*

9. President George W. Bush, *Presidential Response Concerning the Events of September 11, 2001*, 2001 U.S.C.C.A.N. D35. This was President Bush's first address from the White House since the attacks on September 11, 2001.

10. Incidents of racism have swept the nation since September 11, 2001, especially against Arab Americans. E.g., Teresa Mask, *Arab-American Lawyers Ask for Protection*, CHI. DAILY HERALD, Sept. 27, 2001, at 14 (noting death threats received at mosques and other hate crimes directed toward people who appear to be of Middle Eastern descent); Cecilia M. Vega, *Reprisals Worry Arab-Americans, Muslims, Remember Racial Attacks That Followed Oklahoma City Bombing*, PRESS DEMOCRAT, Sept. 12, 2001, at B3 (reporting that approximately 1.2 million people of Arab descent living in the United States are at a high risk of hate crimes. Immediately following the Oklahoma City Bombing in 1995, Muslims reported more than 200 incidents of harassment; similar incidents are expected to occur following the attacks of September 11, 2001).

spond to the threat of domestic terrorism while continuing to safeguard civil liberties.

Part I of this Comment describes three classic theories of democracy. Constitutional democracy entails an active role for the judiciary as part of a counter-majoritarian effort. Representative democracy, in contrast, protects the will of the majority and focuses on judicial restraint. Deliberative democracy focuses more on active participation by the citizenry to uphold the values of the Constitution. Part II examines how representative and constitutional democracy have been applied in another episode in our nation's history—the Japanese internment during World War II. Part III compares the crisis following the September 11 attacks to the Japanese internment and examines how the different branches of government should protect civil liberties. Part IV suggests that a theory of deliberative democracy should be applied to best balance the competing interests of national security and civil liberties.

I. THREE THEORIES OF DEMOCRACY

In times of national crisis, the government must respond effectively, while at the same time preserving constitutional liberties.¹¹ The Supreme Court has traditionally deferred extensively to Congress in times of crisis.¹² In so doing, many laws and rights have been silenced.¹³ Yet hindsight has often left the Court regretting its past decisions.¹⁴ The questions of how to interpret the Constitu-

11. See David Cole, *Fighting Terrorism – Not the Constitution*, RESPONSIVE COMMUNITY, Winter 2001-02, at 48, 52.

12. For a complete discussion of liberties during times of war, see MICHAEL LINFIELD, *FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR* (1990). The book evaluates the government's response to wars and other international incidents throughout American history. *Id.*

13. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that the war-making branches of government are best situated to determine how to wage war successfully). For a complete discussion of the merits of this case, see *infra* Part II.

14. See, e.g., WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998) (tracing attempts by the United States to balance the preservation of civil liberties with the need for national security from the Civil War through the post-World War II era). For example, during the Civil War, President Lincoln suspended the writ of habeas corpus, despite Justice Taney's determination that such suspension was unconstitutional. *Id.* at 39. In an address to Congress, Lincoln asked, "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" President Abraham Lincoln, Message to Congress (July 4, 1861), reprinted in WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, *AMERICAN CONSTITUTIONAL INTERPRETATION* 1373, 1375 (2d ed. 1995). For a complete discussion of the suspension of law during wartime, see REHNQUIST, *supra*, at 218-25 and WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, *AMERICAN CONSTITUTIONAL INTERPRETATION* 1365 (2d ed. 1995).

tion and who has the responsibility to do so are at the core of the tension between deferring to lawmakers and preserving civil liberties.

How the Constitution is interpreted determines how our nation responds to crisis. Some theorists contend that the Court should affirmatively safeguard constitutional rights. This theory is commonly called constitutional democracy. Others espouse a representative democracy, which entails deference to the majority and the political process. This is commonly called representative democracy. Finally, some believe that our system of government was set up to require an active citizenry—a deliberative democracy. Though all three theories agree that citizens have rights against the government,¹⁵ each differs on how those rights should be protected.

A. Constitutional Democracy

Constitutional democracy embraces the idea that the judiciary is primarily responsible for interpreting the Constitution, even though it shares this task with the president and Congress.¹⁶ While it may not be the province of the Court to save the country from ruin, constitutional democrats believe the Court should take an active role especially during times of crisis.¹⁷

Constitutional theorist Ronald Dworkin envisions the Constitution as a protector of individual rights and rejects a simple majoritarian theory of government.¹⁸ Reliance on the political process would yield a "majority rules" approach to civil liberties, and minority groups might suffer as a result.¹⁹

15. See, e.g., *infra* note 37.

16. See, e.g., PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 9, 11 (1949) (noting that, with respect to human rights, there is "a remarkable core of agreement on the Court."); see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 137-38 (1977) (rejecting the simple majoritarian theory of government and relying instead on the judiciary to safeguard our rights).

It is important to note, however, that theorists differ as to the substance of these rights. Compare JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101 (1980) (embracing a process-oriented approach to the Constitution in which the due process rights of individuals are more significant than the substantive rights granted by the Constitution), with Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (suggesting that the rights embodied in the Constitution are more substantive than procedural).

17. See, e.g., Justice William J. Brennan, Jr., *The Quest to Develop A Jurisprudence of Civil Liberties in Times of Security Crises*, Law School of Hebrew University, Jerusalem, Israel, Dec. 22, 1987.

18. See *id.*

19. DWORKIN, *supra* note 15, at 133.

Dworkin opines that the political process alone cannot safeguard our constitutional rights.²⁰ Members of the judiciary are not elected officials and have an obligation to the Constitution, not to the public.²¹ Dworkin's theory of judicial activism assumes that citizens have certain moral rights against the government and that these rights are best protected by the judiciary.²²

Another proponent of constitutional democracy, Justice William Brennan, Jr., advocates that it is the Court's role to resolve public controversies to safeguard constitutional freedoms.²³ Brennan rejects the idea that controversial issues should be left to the political process to resolve.²⁴ He argues that, despite its apparent appeal, resolving controversial issues through the political process is not suitable for a democracy. "It is the very purpose of a Constitution—and particularly the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities."²⁵ This prevents judges from injecting their own views into their opinions.²⁶ Instead of a set of rules, Brennan sees the Constitution as a composition of abstract principles, to be interpreted by every generation.²⁷ "We current justices read the Constitution in the only way we can: as Twentieth-Century Americans."²⁸ The greatest strength of democracy and of the Constitution, Brennan

20. *Id.*

21. *Id.*

22. *Id.* at 255. Dworkin concludes that though a democrat may, at first glance, espouse a government in which elected officials decide "debatable issues of moral and political theory," citizens will only be able to enforce their moral rights against the state through an institution that does not have to answer to a constituency. *Id.* at 255-57.

23. *Id.*

24. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433 (1986). Brennan assumes that there are certain values that are beyond the scope of any legislature. *Id.* at 437. Rejecting a majoritarian theory of government, Brennan embraces the idea that judges must resolve controversies that result from competing factions. *Id.* However, constitutional democrats do not rely solely on judges to safeguard civil liberties. *E.g.*, Douglas W. Kmiec, *Confusing Freedom with License*, RESPONSIVE COMMUNITY, Winter 2001-02, at 56; Laurence H. Tribe, *We Can Strike a Balance on Civil Liberties*, RESPONSIVE COMMUNITY, Winter 2001-02, at 28, 30 (emphasizing that we should not rely solely on the courts to safeguard our freedoms; the legislative branch must do their part as well).

25. Brennan, *supra* note 23, at 437. "Blind faith in democracy is one thing, blind faith quite another." *Id.*

26. *Id.* Brennan calls for an "interaction of reader and text" to resolve ambiguities and move forward both morally and politically. *Id.* at 433.

27. *Id.* at 434. "Justices are not Platonic guardians appointed to wield authority according to their personal moral predilections." *Id.*

28. *Id.* at 438.

insists, is the ability of justices to adapt the principles embodied in the text to current situations.²⁹

According to Brennan, justices cannot “avoid a definitive interpretation”³⁰ of controversial statutes or situations; they are responsible for advancing and protecting our rights and interests.³¹ Brennan warns that as the government increasingly encroaches upon citizens’ private lives, it becomes ever more necessary for the judiciary to actively protect individual rights.³²

Constitutional democracy calls upon judges to use the Constitution to limit what the majority can do.³³ The Court safeguards the principles embodied in the Constitution for all citizens, not just the majority of them.³⁴

Constitutional democracy urges that individual rights be protected even in emergencies.³⁵ In a speech delivered in 1987, Justice Brennan, emphasized that civil liberties should not be sacrificed during times of national crisis.³⁶ Brennan cited several historical examples of the Court’s validation of legislative attempts to sacrifice civil liberties in response to a crisis.³⁷ Brennan emphasized the importance of judicial activism during such times: “A jurisprudence that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment that civil liberties are most in danger.”³⁸

29. *Id.*

30. *Id.* “For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.” *Id.* Brennan suggests that in a constitutional democracy, judges provide the building blocks for future generations to protect against the majority. *Id.* at 437.

31. *Id.*

32. *Id.* But see, e.g., Kmiec, *supra* note 23; Tribe, *supra* note 23 (emphasizing that we should not rely solely on the courts to safeguard our freedoms; the legislative branch must do their part as well).

33. Brennan, *supra* note 23, at 440.

34. E.g., DWORKIN, *supra* note 15, at 249; Brennan, *supra* note 23, at 434-35.

35. Brennan, *supra* note 16.

36. *Id.*

37. *Id.* (“The sudden national fervor causes people to exaggerate the security risks posed by allowing individuals to exercise their civil liberties and to become willing ‘temporarily’ to sacrifice liberties as part of the war effort.”).

38. Brennan cites to the following historical examples of overreaching legislation: In 1798, Congress passed the Alien and Sedition Acts which punished people who were judged dangerous or who wrote against the United States Government. During the Civil War, President Lincoln suspended the writ of habeas corpus, leading to the groundless arrests of 20,000–30,000 people. During World War I, Congress enacted the Espionage Act which criminalized the making of false statements with the intent of interfering with the success of the military. Finally, Japanese and Japanese Ameri-

According to Brennan, the only way to protect citizens' rights is to rely on the fundamental aspirations embodied in the Constitution, and not on the impulses of representatives.³⁹ The time may come, Brennan warned, when elected officials will use their power in ways that are contrary to our notions of democracy.⁴⁰ The judiciary should intervene in these situations to ensure that the goals of the Constitution are enforced.

Hindsight has caused the nation to regret the times it sacrificed civil liberties for national security.⁴¹ It has not yet, however, established a way to deal with similar future problems.⁴² Brennan criticizes the judiciary for not taking responsibility when a situation calls for review.⁴³ There is no question that total deference to elected officials has been detrimental to the civil liberties of citizens.⁴⁴

B. Representative Democracy

In contrast to constitutional democracy, representative democracy, urges the judiciary to defer to the representative process.⁴⁵ Proponents of the theory contend that the legislature and executive have the primary authority to interpret the Constitution. They presume that legislative actions are constitutional so long as they are rational.⁴⁶

cans were interned following the attack on Pearl Harbor and thousands of innocent people were forced from their homes. *Id.* For a detailed discussion of the Japanese Internment, see *infra* Part II.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* Part of the problem may be the United States' infrequent interaction with crisis. "[B]ecause the United States has had the good fortune of relative tranquility, the incidents have been episodic, and the lessons learned and the experience garnered have grown faint during the lapses between security crises." *Id.*

44. *Id.* "We must meet the challenge rather than wish it were not before us." *Id.* Brennan warns, as did Santayana, that "[T]hose who cannot remember the past are condemned to repeat it." *Id.*

45. *Id.* "The trouble in the United States, however, has been not so much the refusal to recognize principles of civil liberties during times of war and national crisis but rather the reluctance and inability to question, during the period of panic, asserted wartime dangers with which the nation and the judiciary is unfamiliar." *Id.*

46. E.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (maintaining that the citizenry's chief protection lies not in the courts, but rather in our political process).

James Bradley Thayer maintains that people are "wise, virtuous, and competent to manage their own affairs."⁴⁷ As such, it is not the duty of the courts to overrule what people do through elected officials.⁴⁸ The majority rules, and whatever the majority sees fit to do should be the rule of the land.⁴⁹

According to Thayer's doctrine of clear mistake,⁵⁰ courts should ask whether the act of the legislature or executive clearly conflicts with the duties of these branches as granted by the Constitution.⁵¹ If the answer is negative, then the Court should simply affirm the legislative action.⁵² Even if it turns out that elected officials have failed to perform their duties, the Court should still be deferential because constituents will simply vote them out of office.⁵³

Thayer acknowledges that the Court is the "ultimate arbiter of what is rational and permissible."⁵⁴ But, it is first and foremost the duty of the legislature to determine the meaning of the Constitution.⁵⁵ The Constitution was written by the people and the legislature is elected by the people.⁵⁶ The legislature, and not the courts, therefore, is the "lawgiver."⁵⁷

Thayer rejects the contention of constitutional democracy theorists that the Court is the protector of rights.⁵⁸ He argues that a limited role of the judiciary is built into the structure of our democracy.⁵⁹ Because the judiciary is given only "incidental and post-

47. See generally Thayer, *supra* note 45, at 135.

48. *Id.* at 149. Thayer justifies his theory on the fact that when the colonists won the Revolutionary War, they took the power that had governed them from Great Britain and transformed it into a system of self-governance. *Id.* at 131. "[T]hey were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty of conducting the government." *Id.*

49. *Id.* at 136.

50. *Id.* "The constitutions not merely intrust to the legislatures a preliminary determination of the question, but they contemplate that this determination may be the final one; for they secure no revision of it." *Id.*

51. *Id.* at 144.

52. *Id.* This test confines the jurisdiction of the Court to only issue a "rule of administration." *Id.*

53. *Id.*

54. *Id.*; see also BICKEL, *supra* note 45.

55. Thayer, *supra* note 45, at 152.

56. *Id.* Thayer rests his theory on the structure of the government. If the judiciary were to have a larger role in interpreting the Constitution, "they would have been let in . . . to a revision of the laws before they began to operate." *Id.* at 136.

57. *Id.*

58. *Id.* at 152, referring to remarks made by an English bishop several centuries ago: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver." *Id.*

59. *Id.* at 136.

poned control”⁶⁰ over acts of the legislature, it should not have the authority to interpret the Constitution as broadly as the legislature.⁶¹

Further, excessive judicial review will encourage the legislature to act based on the constitutionality of laws rather than on their collective wisdom.⁶² Consequently, people will remove themselves from the political process as they see that courts, rather than the legislature, shape and affect policy.⁶³

Not surprisingly, the jurisprudence of the Court during times of crisis under a representative democracy is different from that which constitutional democracy theorists such as Brennan advocate.⁶⁴ In accordance with this theory, Chief Justice William Rehnquist emphasizes the necessity of our Constitution to adapt to wartime.⁶⁵ The emergencies in our nation’s history have resulted in *Inter Armes Silent Leges*—silence of the laws.⁶⁶ Chief Justice Rehnquist recounts incidents where the Court found it necessary to protect the integrity of the country by curtailing the civil liberties of a select few.⁶⁷ Though he does not always agree with the outcome of the cases,⁶⁸ Rehnquist recognizes the need to balance constitutional liberties with constitutional safeguards.⁶⁹ The Chief Justice quotes Justice Learned Hand as saying that “a society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few.”⁷⁰

Another theorist, Alexander Bickel, has suggested that the judiciary remain silent when political questions arise.⁷¹ The judiciary should reserve judgment on such issues rather than rule on what

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 156. Thayer is concerned that legislatures will shy away from enacting laws if the Court always strikes them down. *Id.*

64. *Id.*

65. *Cf. supra* notes 36-44.

66. REHNQUIST, *supra* note 13, at 224.

67. *Id.*

68. *Id.* Throughout the book, Rehnquist cites examples in our nation’s history, including the Civil War, World War I, and World War II, in which citizens have been deprived of their civil liberties. *Id.* at 3-169, 170-83, 194-217.

69. *Id.* at 203.

70. *Id.* at 218.

71. *Id.* at 222 (quoting LEARNED HAND, *THE SPIRIT OF LIBERTY* 191 (1952)).

appear to be imminent cases.⁷² Only ineffective judgments⁷³ will result if the judiciary acts too often or too quickly.⁷⁴

Though Bickel ultimately justifies judicial review on the ground that the judiciary must enforce the will of the people,⁷⁵ he argues that judicial review is a "deviant institution."⁷⁶ Judicial review is undemocratic because, when the Court declares an act unconstitutional, it does so against the will of the prevailing majority.⁷⁷ Representative democracy rests on the theory that citizens can be trusted to elect wise men to positions of power, in both the legislative and executive branches.⁷⁸ Bickel argues that because these two branches need each other to make the law, there is an inherent check on the overwhelming power of the majority.⁷⁹

According to Bickel, when the judiciary uses its power to interpret the Constitution, it renders the legislative branch powerless.⁸⁰ This, in effect, nullifies the votes of the citizens.⁸¹ Bickel further contends that judicial review creates distrust of elected officials.⁸² Even if people do vote, they conclude that their voice may not matter in the end.⁸³ Bickel is concerned that excessive judicial review will damage the political process; rather than becoming active citizens, people will rely on the Court's decisions as definitive.⁸⁴

Bickel believes that how the country should respond to a timely issue is best resolved by the political process, rather than a panel of

72. BICKEL, *supra* note 45, at 51 (stating that the judiciary is a political institution because it retains the power to adjudicate some cases and not others). Bickel therefore advocates that the Court not decide cases that are political in nature because the judiciary is a branch that is "electorally irresponsible and has not earth to draw strength from." *Id.* at 75. This is the basis of the political question doctrine. *Id.*

73. Cf. C.L. Black, Jr., *Mr. Justice Black, the Supreme Court and the Bill of Rights*, HARPER'S, Feb. 1961, at 63, in Bickel, *supra* note 45, at 56 (suggesting the Court maintain an absolutist position in deciding cases before it).

74. Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840, 845 (1989).

75. *Id.*

76. See BICKEL, *supra* note 45, at 26. Bickel notes the power of the Court "to appeal to men's better nature, to call forth their aspirations, which may have been forgotten in the moment's hue and cry." *Id.*

77. *Id.* at 18.

78. *Id.* at 17.

79. *Id.*; see also Thayer, *supra* note 45, at 149.

80. BICKEL, *supra* note 45, at 18. Bickel emphasizes the political process and the cooperation between the legislative and executive branches to "cure inequities of over- and under-representation." *Id.* Also, the legislature has the ability to respond to changes in the polls, which reinforces the will of the majority. *Id.* at 17-18.

81. *Id.* at 20.

82. *Id.* (referring to Judge Learned Hand's belief that his vote was "illusory").

83. *Id.* at 23.

84. *Id.* at 20.

nine justices.⁸⁵ Bickel questions the authority of the Court to supervise this process and contends that the legislature is better able to respond to the changing needs of society.⁸⁶

C. Deliberative Democracy

Deliberative democracy attempts to blur the dichotomy between constitutional democracy and representative democracy.⁸⁷ Cass Sunstein's theory of deliberative democracy rests on the assumption that the founding fathers intended to spur substantive debate among government officials and the citizenry.⁸⁸ Sunstein's position is that law is created by the people and should be upheld by the people. In defending that position, Sunstein challenges the traditional understanding of status-quo neutrality.⁸⁹ Status quo neutrality is the concept that anything that disturbs existing legal entitlements in society is unjust, and anything that reinforces these distributions is neutral and just.⁹⁰ However, because these existing distributions are primarily a product of law, and because law is created by and for the people, this theory is inherently misconceived.⁹¹ People are afraid to actively interpret the text of the Constitution for fear that they may disturb some natural force that does not really exist.⁹²

As a result, Sunstein seeks to abandon the baseline of status quo neutrality and replace it with one that requires an active citizenry.⁹³ In this way, Sunstein's theory of deliberative democracy is similar

85. *Id.* at 22 (referring to Thayer's assumption that reliance on the courts will "dwarf the political capacity of the people"). *Id.*

86. *Id.* at 23 (suggesting that society should not rely on the Court to save itself from ruin).

87. *Id.* at 27. Bickel stresses the power of the "majority to displace the decision-makers." See also Thayer, *supra* note 45, at 144.

88. CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 142 (1993).

89. *Id.* at 9.

90. *Id.* at 4.

91. *Id.* at 3. Sunstein argues that rights are really a product of societal debate and should not be treated as a part of nature. Though nature is not a poor justification for law, it should not be viewed as the rationale for law. In other words, citizens should not be scared to change law for fear of going against nature because laws are really a product of citizens' debates and not nature. *Id.* Sunstein's challenge rests on the assumption that existing distributions are inherently biased: "Respect for existing distributions is neutral only if existing distributions are themselves neutral." *Id.* at 6. Hence, it does not make sense to treat the status quo neutrality as superior to the laws that aim to change the status quo. *Id.*

92. *Id.*

93. *Id.* "The basic problem with status quo neutrality is that it shuts off, at the wrong stage, the American system of deliberative democracy. It refuses to subject existing legal practice to democratic scrutiny." *Id.*

to representative democracy.⁹⁴ Sunstein believes that although judicial review should not be used frequently, when it is used, it should be used aggressively. This will only be necessary in two instances: when rights that are central to the democratic process are at stake or when groups are unlikely to receive fair treatment in the legislative process.⁹⁵

In conjunction with this argument, Sunstein argues that the Constitution should be interpreted outside the courts. According to Sunstein, the Founders created the Bill of Rights in an effort to appeal to the citizenry.⁹⁶ Sunstein emphasizes that the Constitution was written for everyone, "not simply the judges."⁹⁷ As such, it should be actively interpreted by everyone.⁹⁸

A court-centered constitutional scheme is unfavorable for several reasons. First, reliance on the judicial system may distract attention from other more effective strategies.⁹⁹ Though taking away attention from the judiciary may result in a focus on politics, Sunstein views this as a positive result.¹⁰⁰ He criticizes Dworkin's insistence that the court is the "only principled institution"¹⁰¹ and maintains that the other branches of government better reflect the tradition of "principled deliberation."¹⁰² Sunstein also advocates an interpretation of the Constitution outside the courts because judicial decisions are often ineffective.¹⁰³ Finally, elected officials and ordinary citizens should bear part of the burden of social re-

94. *Id.* at 135-36. Though all decisions do not have to be made by all citizens, "[a] system in which such participation is lacking is to that extent a failure." *Id.* at 135.

95. *Id.* at 104.

96. *Id.* at 142-43. Judicial restraint is especially admirable in areas of social reform. *Id.* at 8. Sunstein believes that the primary purpose of judicial review is to reinforce existing democratic processes, rather than supplanting substantive values. The latter is best left to the political process. *Id.* at 104. See also ELY, *supra* note 15, at 72. See also Thayer, *supra* note 45, at 144. Thayer's "clear mistake doctrine" supports Sunstein's idea that judicial review should be used sparingly. See *supra* notes 50-53 and accompanying text.

97. *Id.* James Madison envisioned the public protecting itself, rather than the judiciary: "[A] bill of rights will be a good ground for an appeal to the sense of the community." Letter from James Madison to Thomas Jefferson (Oct. 17, 1778), in SUNSTEIN, *supra* note 87, at 9.

98. *Id.* at 9.

99. *Id.*

100. *Id.* at 145.

101. *Id.* Politics "can inculcate political commitments, broader understandings, feelings of citizenship, and dedication to the community." *Id.*

102. *Id.* at 146 (referring to RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985)); see also *supra* notes 18-22 and accompanying text.

103. SUNSTEIN, *supra* note 87, at 146. Sunstein cites as examples of this deliberation, "the labor movement, the New Deal, the environmental movement, the deregulation movement, and the women's movement." *Id.*

form.¹⁰⁴ Because judges are not experts and do not represent the citizenry, other entities should take responsibility for society.¹⁰⁵

Although it limits the role of the courts, deliberative democracy does not entail unlimited majoritarianism.¹⁰⁶ The judiciary does have a significant, “though secondary,” role to play.¹⁰⁷ When judges interpret the Constitution, they should abandon their own views because they owe a duty of loyalty to the Constitution. Impartiality will ensure that the status quo is subject to the democratic process, which, Sunstein believes, is the bottom line of deliberative democracy.¹⁰⁸

Because preferences have been created by legal rules, it is not always acceptable for judges to yield to the will of the majority preferences.¹⁰⁹ In many situations, a judiciary which departs from the status quo can actually “reflect the democratic aspirations of its citizenry.”¹¹⁰ In this way, public-regarding decisions at times may be at times inconsistent with the very nature of government.¹¹¹ It is necessary for decision-makers to rely on its own instincts of what is just, rather than defer to the majority. Of course, this “instinct” is fueled by the Constitution. In this way, deliberative democracy resembles constitutional democracy.

Deliberative democracy, therefore, seeks to synthesize the idea that decisions reflect what the public wants with the concept of loyalty to the Constitution. In confronting this tension, citizens, to-

104. *Id.* Although *Brown v. Board of Education*, 347 U.S. 483 (1954) is often cited as an example of judicial triumph, it is actually Sunstein's premiere example of judicial weakness. SUNSTEIN, *supra* note 87, at 146. Though the Supreme Court attempted to effectuate social reform in the area of desegregation, no real progress was made until Congress and the President got involved. *Id.*

105. *Id.* at 147.

106. *Id.*

107. *Id.* at 11. A look back at the founding of our country indicates that the framers did not intend our government to run by complete deference to the majority. *Id.* at 19. While the Articles of Confederation allowed private interest groups to dominate government, the new Constitution sought to remedy this. *Id.* In effect, deliberative democracy was created as an attempt to hold officials accountable while at the same time not allowing factions to dominate government. *Id.* at 19-20.

108. *Id.* at 11.

109. *Id.* at 149. Sunstein views the courts as simply another branch of government that has the authority and the responsibility to “allow democratic politics to alter existing distributions.” *Id.*

110. *Id.* at 162-63. Sunstein explores the approach that a deliberative democracy should take in making decisions that alter the status quo. Though deference to the majority is often viewed as respecting existing distributions, Sunstein argues that because many of these distributions are inherently unjust, laws which do not yield to the status quo are often acceptable and even encouraged. *Id.*

111. *Id.* at 11.

gether with the courts and legislature, should debate issues in a way that is commensurate with the common good. Rather than rely on the courts or the political process, deliberative democracy primarily relies on an active citizenry to create and enforce its laws. Such deliberation should then be reflected in judicial decisions.

II. THE ROLE OF THE SUPREME COURT IN WORLD WAR II: A HISTORICAL LOOK BACK

Throughout history, the Court has adopted, rejected, and modified the theories of constitutional and representative democracy. In times of crisis, the judiciary has been forced to reevaluate its role in maintaining order and securing civil liberties.¹¹² Since the United States has not been faced with a continuous threat to its national security,¹¹³ the judiciary has not developed a consistent jurisprudence for balancing national security with the protection of civil liberties.¹¹⁴ The situation involving the Japanese internment during World War II exemplifies this tension.

Following the attack on Pearl Harbor on December 7, 1941, many West Coast residents grew fearful of Japanese-Americans.¹¹⁵ Though the Japanese had begun to settle on the West Coast before the turn of the century, they retained a separate and distinct lifestyle.¹¹⁶

The U.S. government set up a commission to determine how the Japanese carried out the Pearl Harbor attacks.¹¹⁷ The Commission, which was chaired by Associate Justice Owen J. Roberts, found that spies in Hawaii had collected and transmitted information to Japan. Following the Roberts Commission's fact-finding report, government officials called for the relocation of persons of Japanese ancestry living on the West Coast.¹¹⁸ Overwhelming public sentiment indicated that citizens feared another Japanese invasion.¹¹⁹ Furthermore, some public officials believed that people of Japanese ancestry should be relocated to protect them from hate

112. *Id.* at 25.

113. *See, e.g.,* Brennan, *supra* note 16.

114. *See id.*

115. *See id.*

116. REHNQUIST, *supra* note 13, at 188.

117. *Id.* at 188.

118. *Id.* at 188-89.

119. *Id.* Japanese espionage was especially active during the weeks leading up to the attack on Pearl Harbor. *Id.* As a result, the Japanese were certain of the exact location of air fields and hangars—knowledge that was crucial in carrying out the attack. *Id.* at 190. It should be noted, however, that President Roosevelt authorized the War Department to prepare for the evacuation of the Japanese two days before

crimes.¹²⁰ Opposition from civil liberties groups was evident but not strong enough to make an impact.¹²¹

On February 19, 1942, nearly seventy days after the attack on Pearl Harbor, President Franklin Delano Roosevelt issued Executive Order 9066 (the "Order"), which authorized the removal of ethnic Japanese from the West Coast.¹²² Congress subsequently passed several measures which criminalized violations of this Order or any regulation that might be issued to implement the Order.¹²³

In *Korematsu v. United States*,¹²⁴ the Supreme Court was asked to rule on the constitutionality of the relocation requirement.¹²⁵ The year before, in *Hirabayashi v. United States*,¹²⁶ the Court had held that the curfew requirement for Japanese residents was constitutional.¹²⁷ Chief Justice Stone, writing for the Court in *Hirabayashi*, avoided answering the larger question of the validity of the relocation requirement.¹²⁸ Nevertheless, Stone limited the jurisdiction of the Court by concluding that the actions of the executive and Congress need only have a rational basis.¹²⁹ Stone found that the avoidance of espionage and sabotage by Japanese Americans

the final recommendation was even completed. *Id.* at 191 (citing FRANCIS BIDDLE, IN BRIEF AUTHORITY 250 (1962)).

120. *Id.* at 188.

121. *E.g.*, MURPHY, FLEMING & BARBER, *supra* note 13, at 88.

122. *E.g.*, *id.* at 88; *see also* REHNQUIST, *supra* note 13, at 191. Attorney General Francis Biddle later acknowledged that the military might have been wrong in its determination. *Id.* Moreover, prior to internment, the Chief of Naval Operations stated that a full-scale Japanese invasion was "impossible" and the army's general staff recommended against mass evacuations. LINFIELD, *supra* note 11, at 93. But the administration was widely supported by the public, so any opposition was not taken very seriously. *See* REHNQUIST, *supra* note 13, at 219 (citing FRANCIS BIDDLE, IN BRIEF AUTHORITY (1962)).

123. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). The Order was finally rescinded by President Gerald Ford in 1976, over thirty years after it was first issued. LINFIELD, *supra* note 11, at 96.

124. Some of these regulations included a curfew; a requirement for ethnic Japanese to report to relocation centers; forced sale of houses and businesses; and relocation to camps located away from the West Coast. Though there was no physical brutality of Japanese and Japanese Americans, living conditions were uncomfortable. Military Areas or Zones, Restrictions, 77 Pub. L. No. 503, 56 Stat. 173 (1942).

125. *Korematsu v. United States*, 323 U.S. 214 (1944).

126. *Id.* at 216.

127. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

128. *Id.* at 101; *see also* MURPHY, FLEMING & BARBER, *supra* note 13, at 89; REHNQUIST, *supra* note 13, at 198.

129. *Hirabayashi*, 320 U.S. at 105. "It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order." *Id.*

was a rational basis for the curfew requirement.¹³⁰ This was enough to justify the curfew requirement.¹³¹

The Court hoped to avoid the war arena by deciding the case on the narrow grounds of protection against espionage and sabotage. By the time *Korematsu* came before the Court in 1944, however, the initial shock of Pearl Harbor had receded and the Court felt obligated to go one step further.¹³² Fred Korematsu was convicted for not reporting for relocation in violation of the relocation act.¹³³ After the Ninth Circuit sustained his conviction,¹³⁴ the Supreme Court granted certiorari.¹³⁵ Justice Black's opinion began by establishing the standard of review as strict scrutiny.¹³⁶

Purporting to apply this standard, Black found that the regulation at issue was closely related to the threat.¹³⁷ He relied on evidence of Japanese disloyalty presented at congressional hearings¹³⁸ to find that a significant threat existed.¹³⁹ Black went on to justify the right of the Executive and Legislature to respond to this threat: "[W]hen under conditions of modern warfare our shores are

130. *Id.* at 93. "That reasonably prudent men charged with the responsibility of our national defense had ample grounds for concluding that they must face the danger of invasion, take measures against it, and in making the choice of measure considered our internal situation, cannot be doubted." *Id.* at 94.

131. *Id.*

132. *Id.* at 98.

133. *Korematsu*, 323 U.S. at 217.

134. *Id.* at 215. The Act that Korematsu was convicted of violating was Civilian Exclusion Order No. 34. Congress had enacted this in order to implement Executive Order 9066. *Id.* at 216. The American Civil Liberties Union chose Fred Korematsu to test the constitutionality of the evacuation orders. PAGE SMITH, *DEMOCRACY ON TRIAL: THE JAPANESE AMERICAN EVACUATION AND RELOCATION IN WORLD WAR II* 208 (1995).

135. *Korematsu v. United States*, 140 F.2d 289 (9th Cir. 1943), *aff'd*, 323 U.S. 214 (1944).

136. *Korematsu v. United States*, 321 U.S. 760. Ironically, Justice Black, who wrote the opinion for the Court, voted against granting certiorari. Chief Justice Stone did not vote at all. MURPHY, FLEMING & BARBER, *supra* note 13, at 93.

137. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). "It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Id.* This is the first time that the Court used the strict scrutiny standard of review and the only time that the Court upheld a restriction under this standard. See MURPHY, FLEMING & BARBER, *supra* note 13, at 892. Strict scrutiny requires that a regulation based on race or ethnicity be a pressing public necessity and narrowly tailored to meet this need. *Id.*

138. *Korematsu*, 323 U.S. at 219.

139. *Id.* Such findings indicated that "approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor." *Id.*

threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”¹⁴⁰

Deferring to the powers of the war-making branches of government, Black upheld the constitutionality of the Act.¹⁴¹ Black concluded that it was not the province of the Court to interfere with the regulation.¹⁴² Although the Court found that a “pressing public necessity” probably did not exist by the time the case reached the Court, the need to prevent against sabotage and espionage at the time Korematsu violated the Act was sufficient to justify the relocation.¹⁴³

Black’s faith in the executive’s and Congress’s judgment is consistent with Thayer’s confidence in elected officials and his “clear mistake” doctrine.¹⁴⁴ Black believed the Court should interfere only to the extent necessary to make sure the Act was consistent with the Constitution.¹⁴⁵ In his concurrence, Justice Frankfurter acknowledged that the military is bound by the confines of the Constitution.¹⁴⁶ At the same time however, Frankfurter stated that the “war power of the government is ‘the power to wage war successfully.’”¹⁴⁷ Frankfurter concluded that the Act fell under the

140. *Id.*

141. *Id.* at 220.

142. *Id.* at 223. Black stated that the Court could not reject Congress’s view: “We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with. . . .” *Id.* at 218 (citing *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)). This is actually a lower standard than Black purported to use.

143. *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

144. *Id.* at 219. “We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.” *Id.* at 224. Yet hindsight, or at least perspective, is precisely what Black employed in his dissents in later decisions when Communists were prosecuted for their beliefs by the federal government. For an example of one such dissent, see *American Communications Ass’n. v. Douds*, 339 U.S. 382, 445 (1950). “Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their beginnings, generate hatreds and prejudices which rapidly spread beyond control.” *Am. Communications Ass’n. v. Douds*, 339 U.S. 382, 448 (Black, J., dissenting). Black spoke of the abstracts embodied in the Constitution that guarantee absolute rights, free from encroachment by the government: “But not the least of the virtues of the First Amendment is its protection of each member of the smallest and most unorthodox minority.” *Id.*

145. For a detailed discussion of Thayer’s thesis, see *supra* Part I.B. Black deferred to the war-making branches of government, though he purported to use the strict scrutiny standard of review. *Korematsu*, 323 U.S. at 223.

146. *Id.*

147. *Id.* at 224 (Frankfurter, J., concurring). “The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs.” *Id.*

powers of Congress: "And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts."¹⁴⁸

Both Justices Black and Frankfurter avoided balancing the rights of Japanese Americans against the interest of national security by deferring to the other branches of government.¹⁴⁹ They did not take responsibility for protecting the interests of the interned Japanese Americans. Black discussed the hardships of war, saying only that "all citizens alike . . . feel the impact of war in greater or lesser measure."¹⁵⁰ The *Korematsu* majority and concurrence did not speak of any of the guarantees mentioned in the Bill of Rights, including equal protection of the laws as guaranteed by the Fifth Amendment.¹⁵¹ Rather, the majority and concurrence deferred to the judgments of Congress and the Executive: "That is their business, not ours."¹⁵² This is the very essence of Thayer's representative democracy.¹⁵³

The *Korematsu* majority insisted that its decision was motivated solely by the potential danger to national security.¹⁵⁴ In his dissent, Justice Murphy accused the majority of being swayed by racism.¹⁵⁵ Though Murphy recognized the need to defer to the military authorities' judgment on the facts of war, he warned of the need for limits on that deference.¹⁵⁶ The limits on the military's power is a

148. *Id.* at 223 (Frankfurter, J., concurring) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943 Hughes, C.J.)).

149. *Id.* at 225.

150. *Id.* at 223. Cf. Brennan, *supra* note 16 (advocating balancing rights and protecting civil liberties).

151. *Korematsu*, 323 U.S. at 219.

152. See 323 U.S. at 235 (Murphy, J., dissenting).

153. *Id.* at 225 (Frankfurter, J., concurring).

154. *Supra* Part I.B.

155. *Korematsu*, 323 U.S. at 223. "To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue." *Id.*

156. *Id.* at 233 ("Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism"). In fact, Murphy labeled the majority decision a "legalization of racism." *Id.* at 242. Murphy went on to show that contrary to the majority opinion's findings, there was no evidence of disloyalty by Japanese Americans. *Id.* at 219. Further, there was no evidence that *Korematsu* himself was disloyal. LINFIELD, *supra* note 11, at 95. Murphy's accusations of racism have been confirmed since the decision was handed down in 1944. General John L. DeWitt, in testimony before the House Naval Affairs Subcommittee, stated, "A Jap's a Jap. . . . There is no way to determine their loyalty. . . . It makes no difference whether he is an

question for the judiciary.¹⁵⁷ Murphy argued that the Act deprived individuals of equal protection of the laws as guaranteed by the Fifth Amendment.¹⁵⁸ Further, no “immediate, imminent and impending”¹⁵⁹ public danger could justify such a racially motivated restriction.¹⁶⁰

Rather than focusing on the apparent military necessity of the Act,¹⁶¹ Murphy focused on the Act’s unfairness, calling the decision “one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.”¹⁶² He believed that the military relied improperly upon a racist ideology¹⁶³ that had persisted for years against Japanese Americans.¹⁶⁴

The United States Government did not find a significant number of persons of Japanese ancestry to be disloyal.¹⁶⁵ Murphy believed the Act was overbroad and racist and thus should be struck down.¹⁶⁶ Murphy was also concerned about safeguarding the rights of minorities in future situations.¹⁶⁷ He warned that the faulty rationale employed in this case would “encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.”¹⁶⁸

Murphy’s dissent reflects the constitutional democracy advocated by Dworkin and Brennan advocate.¹⁶⁹ Although the public supported the holding in *Korematsu*,¹⁷⁰ this should not have prevented the Court from actively correcting the false assumptions

American; theoretically he is still a Japanese and you can’t change him.” RICHARD DRINNON, *KEEPER OF CONCENTRATION CAMPS* 31 (1987). Furthermore, the Congressional Commission on Wartime Relocation unanimously concluded in 1983 that the Order had been prompted by “race prejudice, war hysteria and a failure of political leadership.” PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE INTERNMENT CASES* 362 (1983).

157. *Korematsu*, 323 U.S. at 234.

158. *Id.* (citing *Sterling v. Constantin*, 287 U.S. 378, 401 (1932)).

159. *Korematsu*, 323 U.S. at 234.

160. *Id.*

161. *Id.* Murphy was wary of the assumptions upon which the military based its judgments. 323 U.S. at 236-39.

162. *Id.* at 223.

163. *Korematsu*, 323 U.S. at 235.

164. *Supra* note 155 and accompanying text.

165. *Korematsu*, 323 U.S. at 239.

166. *Id.* at 219.

167. *Id.* at 240.

168. *Id.*

169. *Id.*

170. *See supra* Part I.A.

upon which judicial decisions can be made.¹⁷¹ Specifically, Murphy criticized the majority's racism and deprivation of liberties of Japanese and Japanese Americans.¹⁷² Murphy envisioned the Constitution as a guarantor of freedom during peacetime and wartime alike.¹⁷³

Justice Jackson, also dissenting, criticized the majority's acceptance of the military decision. Though the military may have acted appropriately given the expediency of the situation,¹⁷⁴ Jackson argued the Court should still determine whether it acted within constitutional boundaries.¹⁷⁵ Though Jackson would have preferred to stop with *Hirabayashi*, he believed the Court could not forsake its duty to determine the constitutionality of the Order.¹⁷⁶ To do so would have left the country at the mercy of the military.¹⁷⁷ Rather, the Court should have reviewed the constitutionality of such orders.¹⁷⁸ Military orders end with emergencies, but judicial opinions have lasting consequences.¹⁷⁹ As Jackson stated, "[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself."¹⁸⁰ In accordance with democratic constitutionalism,¹⁸¹ Jackson believed that allegiance to the Constitution is an essential safe-

171. See, e.g., MURPHY, FLEMING & BARBER, *supra* note 13, at 100.

172. *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting); see also DWORKIN, *supra* note 15, at 257-58. Dworkin rejects the simple majoritarian theory of government and advocates an active role of the judiciary. *Id.*

173. If the public had been correctly informed about the unsubstantiated threat that the Japanese residents posed to our nation, sentiment might have been different. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (holding that no public necessity existed to justify the suspension of habeas corpus in Hawaii after the war had ended). But see MURPHY, FLEMING & BARBER, *supra* note 13, at 1364 (stating there was a significant fear of invasion at that time).

174. *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting). "They must accordingly be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution." *Id.* See also Brennan, *supra* note 16.

175. *Korematsu*, 323 U.S. at 244 (Jackson, J., dissenting). Jackson acknowledged that "The armed services must protect a society, not merely its Constitution." *Id.*

176. *Id.* at 245. "[E]ven if they were permissible military procedures, I deny that it follows that they are constitutional." *Id.*; see also *id.* at 246 ("A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution."); Brennan, *supra* note 16.

MURPHY, FLEMING & BARBER, *supra* note 13, at 93.

177. *Id.*

178. *Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

179. *Id.*

180. *Id.* "[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle

guard against the infringement of civil liberties.¹⁸² He feared that the hesitance of the Court to get involved would lead to abuse of power by elected officials: "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."¹⁸³

This "loaded weapon" Jackson spoke of apparently had already been picked up by dangerous hands—the *Korematsu* majority. By relying on *Hirabayashi*,¹⁸⁴ the majority affirmed the military's orders.¹⁸⁵ But Jackson attacked the Court's circular reasoning:¹⁸⁶ "The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding."¹⁸⁷

Jackson wanted the Court to actively review not only the decisions of the other branches of government, but those of the judiciary as well.¹⁸⁸ Once a Court establishes a principle, it becomes doctrine until a subsequent Court actively overrules it.¹⁸⁹ The Court has not yet overruled *Korematsu*.¹⁹⁰

of racial discrimination in criminal procedure and of transplanting American citizens." *Id.* at 246; see also MURPHY, FLEMING & BARBER, *supra* note 13, at 94.

181. *Korematsu*, 323 U.S. at 245-46.

182. See Brennan, *supra* note 23.

183. *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting).

184. *Id.* at 246. Jackson was concerned about people coming to power that would not uphold the principles embodied in the Constitution. "If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint." *Id.* at 248. This resounds of Brennan's speech, *supra* note 16, in which he feared what would happen when men of abusive power came to power. Here, Jackson was concerned that the Constitution must be protected against all those in power, including judges. *Korematsu*, 323 U.S. at 246.

185. 320 U.S. at 81.

186. *Korematsu*, 323 U.S. at 217 (holding that the precedent established in *Hirabayashi* precludes the Court from holding that Congress and the Executive lacked the authority to exclude those of Japanese ancestry).

187. *Id.* at 247 (Jackson, J., dissenting).

188. *Id.* The Court in *Hirabayashi*—the same Court that sat on the bench to hear the *Korematsu* decision—expressly limited its discussion to the issue of review and declined to address the constitutionality of the exclusion issue.

189. *Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting). Jackson, in response to the Court's illogical conclusion in *Korematsu*, said "How far the principle of this case would be extended before plausible reasons would play out, I do not know." *Id.*

190. See, e.g., *supra* note 179.

III. SEPTEMBER 11, 2001: A NEW PERSPECTIVE

*If I see someone come in and he's got a diaper on his head and a fan belt around that diaper on his head, that guy needs to be pulled over and checked.*¹⁹¹

—Rep. John Cooksey of Louisiana

A new racism has surfaced in the aftermath of September 11. Rather than targeting African Americans, or Japanese Americans,¹⁹² perpetrators have committed hate crimes against Arab Americans.¹⁹³ Shortly after the terrorist attacks, four men of Arab descent were asked to get off an airplane because of complaints from the passengers.¹⁹⁴

Further, the public appears to accept this new type of profiling.¹⁹⁵ In a poll conducted by the *Los Angeles Times*, sixty-eight percent of those polled favored allowing law enforcement to randomly stop people who fit the profile of suspected terrorists.¹⁹⁶ Further, a recent study shows that sixty-four percent of Americans

191. Though the Court has never explicitly overruled *Korematsu*, there have been several implicit admissions of guilt. In 1948, Congress passed the Japanese-Americans Evacuations Claim Act to help compensate some of the victims of the evacuation. 50 App. U.S.C.A. §1981 (1948). Further, in 1984 the U.S. District Court vacated *Korematsu*'s conviction. *Korematsu v. U.S.* 584 F. Supp. 1406 (D.C. Cal. 1984).

192. See Cooksey *Backs Profiling Individuals of Arab Descent*, CONG. DAILY, Sept. 19, 2001, at 11. Although Cooksey later recanted this statement, he justified his position: "When you've got a group of people who are not American citizens, who are of Arab descent and they were involved in killing 5,000 Americans . . . I think we can and should scrutinize people that fit that profile until this war on terrorism is over." *Id.*

193. Statistics indicate that, in the weeks following September 11, discrimination complaints dropped sharply nationwide among African Americans, while complaints by Arabs and Middle Easterners increased dramatically. Kevin Murphy, *Discrimination Complaints Drop Nationwide Following Terrorism Attacks*, WORLD REP., Nov. 8, 2001; see also Sherry Colb, *The New Face of Racial Profiling: How Terrorism Affects the Debate*, at <http://writ.news.findlaw.com/colb/20011010.html> (Oct. 10, 2001).

194. E.g., Bush, *supra* note 8. For further recounts of prejudice against Arab Americans, see, for example, John Dean, *Why Middle Eastern Immigrants Are Worried: Reasonable Fears, Difficult Law Enforcement Problems*, at <http://writ.news.findlaw.com/dean/20011012.html> (Oct. 12, 2001).

195. See John Derbyshire, *A (Potentially) Useful Tool*, RESPONSIVE COMMUNITY, Winter 2001-02, at 67. Authorities later apologized for this incident. See Elaine Jarvik, *Utahns Reflect on Life After 9/11*, DESERET NEWS, Nov. 25, 2001, at A1.

196. See, e.g., Colb, *supra* note 192. Colb suggests that because the overwhelming majority of terrorists are of Arab descent, those who have opposed racial profiling may now think that racial profiling of Arab Americans is acceptable. In comparison to the profiling of African Americans, which is done mostly for the purpose of finding drug dealers, profiling of Arab Americans now may prevent terrorism, an arguably much more urgent and pressing problem. *Id.*

now trust the federal government to do the right thing almost always or at least most of the time.¹⁹⁷

The question therefore becomes, how should America respond to the September 11 terrorist attack? The nation has been, more or less, blessed with continuous safety, interrupted only by intermittent threats.¹⁹⁸ As a result, it has not developed a jurisprudence ready to deal with crises of the magnitude of the September 11 events.¹⁹⁹

Shifts in public sentiment indicate that changes in how our country responds may be forthcoming. Before September 11, people were very hesitant to accept any government proposal that would impinge on civil liberties.²⁰⁰ Following the attacks, sixty-one percent of Americans think that it will be necessary for the average person to surrender some civil liberties.²⁰¹ While government was once seen as the main threat to our liberties, it may now be seen as the solution.²⁰² According to some, terrorism has replaced government as the most significant threat to our freedom.²⁰³

A. USA PATRIOT Act

In the aftermath of September 11, a bipartisan Congress acted quickly to enact one of the most sweeping antiterrorism bills in history.²⁰⁴ The sentiment and regret that followed the *Korematsu*

197. Mark Z. Barabak, *America Attacked Times Poll: U.S. Keen to Avenge Attacks*, L.A. TIMES, Sept. 16, 2001, at A1 (polling a national sample of 1561 adults). See also Derbyshire, *supra* note 194, at 70 (maintaining that profiling is acceptable "so long as the authorities treat everyone with courtesy and apologize to the inconvenienced innocent"). But see Tribe, *supra* note 23 (warning that using racial characteristics to identify terrorists is unnecessary because we have technology that can detect individual suspects). Further, we should be careful not to set a dangerous precedent. *Id.*

198. Robin Toner, *Now, Government is the Solution, Not the Problem*, N.Y. TIMES, Sept. 30, 2001, at 14. Following the 1960s, there was a dramatic decline in public trust, as well as civic engagement. Robert Putnam, *The Strange Disappearance of Civic America*, AM. PROSPECT, 1996, at 24, 36 (commenting on the decline in civic participation in America over the last several decades). This statistic is remarkable in light of the 2000 presidential election controversy and the low approval ratings of the President and Congress shortly thereafter.

199. Brennan, *supra* note 16.

200. *Id.*

201. Amitai Etzioni, *Rights and Responsibilities, 2001*, RESPONSIVE COMMUNITY, Winter 2001-02, at 5 (predicting that the events of September 11 will have long-reaching effects on our attitude toward government).

202. Barabak, *supra* note 196.

203. Toner, *supra* note 197.

204. Etzioni, *supra* note 200.

decision²⁰⁵ have rendered the possibility of facially discriminatory legislation unlikely. But laws that surreptitiously impinge on the civil liberties of minorities may be passed.²⁰⁶ Though these laws may meet the demands of the public for greater security, the civil liberties of many minorities, and perhaps all of us, are at stake.

On October 26, 2001, President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act").²⁰⁷ The PATRIOT Act is designed to effectively prosecute those responsible for the events of September 11 and similar incidents, as well as to prevent future attacks.²⁰⁸ At the same time, the Act purports to protect the civil rights and liberties of all Americans.²⁰⁹

Some of the PATRIOT Act's provisions purport to do little more than strengthen existing laws. For example, Section 105 requires that the Director of the U.S. Secret Service develop a national network of electronic crime task forces to "prevent, detect, and investigate various forms of electronic crimes."²¹⁰ As a result, the government will be better able to trace criminal activity by anyone who tries to interfere with computer infrastructure. Few would ar-

205. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat 272.

206. See *supra* note 190. Justice Douglas, who joined the *Korematsu* majority and had shied away from writing a dissent, admitted that he had made a mistake: "I caved in." MURPHY, FLEMING & BARBER, *supra* note 13, at 98. Criticism of the decision came from several different sources. Lt. Felix F. Stumpf had written to Justice Jackson that the decision "is the type of blow from which we cannot recover so easily. It introduces racialism, the very racialism we are fighting so strenuously to eliminate . . . [Through that decision] the Court has . . . deprived an American citizen of his rights, utterly devitalizing the constitutional principles which are included in the word 'citizen.'" Lt. Felix F. Stumpf to Robert H. Jackson, Apr. 18, 1945; Jackson Papers, Box 132, in MURPHY, FLEMING & BARBER, *supra* note 13, at 99. For further criticism of the rationale behind the *Korematsu* decision, see Mari J. Matsuda, *McCarthyism, the Internment and the Contradictions of Power*, 19 B.C. THIRD WORLD L.J. 9, 17-18 (1998). Matsuda is skeptical of the Court's justification of military necessity; she sees race as the Court's motivating factor. *Id.* For further criticism of the conclusions drawn by the majority, see Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

207. For example, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court struck down a statute that although purporting to treat everyone alike, had a disparate impact on minorities. See also Cole, *supra* note 10, at 48 (cautioning that in the wake of September 11, we should only accept legislation applied to all people equally).

208. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat 272.

209. *Id.* § 102.

210. *Id.* § 102.

gue that such authority to stamp out crime impinges on civil liberties.

The PATRIOT Act's attempt to strengthen intelligence mechanisms will not likely be met with much opposition. For example, the PATRIOT Act requires that the Federal Bureau of Investigation ("FBI") provide airlines access to the names of passengers who are suspected of terrorist activity.²¹¹ Because one of the primary complaints of September 11 was that several of the people on the passenger list were on the FBI's ten most wanted list, few will oppose this measure.²¹²

Though some of the PATRIOT Act's provisions explicitly change existing laws, even civil libertarians acknowledge the need for some change.²¹³ Immigration laws have, for example, been tightened under the PATRIOT Act.²¹⁴ The threat of terrorism has caused many people to change their views about profiling and related detention.²¹⁵ The FBI now has the power to detain and deport any alien if there is "reason to believe [the alien] may further or facilitate acts of terrorism" or "any other activity that endangers the security of the United States."²¹⁶ Further, an alien's privilege

211. *Id.* § 105.

212. *Id.* § 1009.

213. See, e.g., Jeffrey Toobin, *Crackdown: Should We Be Worried About the New Antiterrorism Legislation?* NEW YORKER, Nov. 5, 2001, at 56, 58. ("It's mind boggling that information exists in the U.S., even in the F.B.I., and it's not being used to protect people. . . . On Sept. 11, we realized that we couldn't debate it philosophically anymore." (quoting Michael Chertoff, Assistant Attorney General in charge of the Criminal Division)).

214. See, e.g., *id.* "The current investigation so far, reflects a change in emphasis and focus, rather than a more dramatic change in kind." *Id.* (referring to the PATRIOT Act's granting of authority to detain material witnesses who violate immigration laws, not Bush's executive order). But see Cole, *supra* note 10 (criticizing the extraordinary number of people who are harmed by the amended immigration provisions of the PATRIOT Act).

215. E.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 402, 115 Stat 272 (tripling the number of Border Patrol, Customs Service and INS personnel). See also § 416 (directing the Attorney General to expand foreign student monitoring to include air flight training, language training, and vocational school attendance).

216. See, e.g., Pam Belluck, *Hue and Murmur Over Curbed Rights*, N.Y. TIMES, Nov. 17, 2001, at B8. ("The traditional way we balance these things is with the maxim, 'It's better that ten guilty men go free than one innocent man be in jail.' I think people are a little nervous about applying that maxim where the ten guilty men who are going free could have biological weapons." (quoting Michael C. Dorf, professor of constitutional law at Columbia University)). Belluck also notes that Peter J. Rubin, a Georgetown University law professor, has no problem with questioning or detaining new immigrants so long as there are limits to this power. Even civil libertarian Laurence H. Tribe, a professor at Harvard Law School, has changed his perspective significantly since September 11. "The prospect of someone who might be a material

to remain in the United States may be withdrawn.²¹⁷ People are more willing to accept some infringements on civil liberties in exchange for better security.²¹⁸ Section 206, for example, allows for expanded roving surveillance so that the Foreign Intelligence Surveillance Court could authorize wiretaps without a showing of probable cause of crime.²¹⁹ Though this will greatly expand the power of the government to conduct electronic surveillance, such authority may be necessary given the current threat of terrorism.²²⁰

There are, however, several provisions of the PATRIOT Act which civil libertarians strongly oppose. One such measure is Section 218, which amends the Foreign Intelligence Surveillance Act of 1978 ("FISA").²²¹ FISA was enacted in 1978 following Watergate and the Supreme Court's holding that the Fourth Amendment's protection against unreasonable searches covered wiretaps.²²² The original FISA required that the "primary purpose" of surveillance was to obtain foreign intelligence information.²²³ But following September 11, the standard has been lowered.²²⁴ Now, so long as a "significant purpose" of the surveillance is to obtain foreign intelligence information, the search will be permissible.²²⁵ David Chertoff, assistant attorney general in

witness being held indefinitely is scary. But the idea that someone might be released and then go and blow up Cleveland is scarier still." *Id.*

217. See Mark Krikorian, *Immigration: A Privilege or a Right?* 12 THE RESPONSIVE COMMUNITY 1, —46 (Winter 2001/02). See also Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat 272.

218. Krikorian, *supra* note 216, at 47.

219. See, e.g., Krikorian, *supra* note 216, at 46 (suggesting that the new immigration provisions are entirely constitutional).

220. Section 206 amends the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1805(c)(2)(B), to grant roving surveillance authority for the purpose of furnishing necessary information that may be helpful in an investigation. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 206, 115 Stat 272.

221. See, e.g., William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31 (calling on the government to hold onto American liberties while defending our country against those who are trying to trump our freedom).

222. 50 U.S.C. 1805 (1978).

223. See Toobin, *supra* note 212, at 58-9.

224. 50 U.S.C. 1805 (1978), amended by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 218, 15 Stat 272.

225. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 218, 15 Stat 272.

charge of the Department of Justice's Criminal Division, justifies this rule based on the need for change in law enforcement.²²⁶

Many have criticized this change as unconstitutional. The new standard leaves open the possibility that factors beside national security may influence the issuance of warrants. Sen. Russell Feingold, for example, the only senator to vote against the PATRIOT Act, cited this section as one of the main reasons for his voting against it.²²⁷

In remarks delivered to Congress, Senator Feingold criticized the PATRIOT Act in its entirety.²²⁸ He warned that the new legislation would endanger those liberties the United States is fighting to protect.²²⁹ Citing examples of history where the U.S. government deprived citizens of their constitutional freedoms, Feingold implored Congress not to make the same mistake again.²³⁰ Nevertheless, the PATRIOT Act passed with overwhelming support.²³¹

B. Bush's Executive Order

Perhaps even more controversial than the PATRIOT Act is President Bush's Executive Order ("Executive Order"), establishing military tribunals for suspected terrorists.²³² The Executive Order allows foreigners²³³ charged with terrorism to be tried in secret tribunals outside of the United States.²³⁴ Traditionally, suspected

226. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272.

227. See Toobin, *supra* note 212, at 60 (noting that while the old language separated law enforcement into foreign intelligence and law-enforcement, the new situation abolishes this distinction).

228. See Toobin, *supra* note 212, at 60 "It's the Attorney General's private playground," he argued in opposition to this lower standard." *Id.*

229. *A Broad Search for Suspects*, N.Y. TIMES, Nov. 25, 2001, at B4.

230. *Id.* ("It is very important that we give the Department of Justice and the intelligence agencies the tools they need to combat and prevent terrorism. But it is also crucial that civil liberties in this country be preserved, otherwise I'm afraid that terror will win this battle without firing a shot.").

231. *Id.*

232. The PATRIOT Act passed the Senate 98 yeas to 1 nay. 147 Cong. Rec. D1053-02.

233. Military Order issued on Nov. 13, 2001 by President George W. Bush. 66 Fed. Reg. 222 (Nov. 26, 2001). Available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

234. In January 2002, the United States Armed Forces transferred thousands of captives allegedly connected to the Al-Qaeda network to the United States Naval Base at Guantanamo Bay, Cuba. Though non-citizens are not entitled to the same rights as citizens, many disagree, arguing that the prisoners held at Guantanamo Bay following September 11 should be given more protections. Following a petition made by civil rights advocates, a federal court in California concluded that the 1949 Geneva

terrorists have been tried in regular courts.²³⁵ The President cited the need to protect the country against terrorism as the driving force behind this order: "It is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts."²³⁶

The Bush Administration believes that a drastic change is necessary to prevent future attacks and to punish terrorists appropriately.²³⁷ Insisting that foreign terrorists "do not deserve the protection of the American Constitution,"²³⁸ Attorney General John Ashcroft justifies the Executive Order on grounds of public necessity.²³⁹ President Bush has steadfastly maintained that military tribunals are the only appropriate response during this time of crisis: "The enemy has declared war on us. And we must not let foreign enemies use the forums of liberty to destroy liberty itself."²⁴⁰

The Bush and Ashcroft justifications have engendered much opposition.²⁴¹ One commentator decried the Executive Order as a sacrifice of American institutions and liberties: "It's time for conservative iconoclasts and card-carrying hard-liners to stand up for American values."²⁴²

Convention affords the prisoners some rights. Their claim however, was denied because the petitioners lacked standing to file this suit. *Coalition of Clergy v. Bush*, No. CV 02-570 AHM (JTLX), 2002 WL 272428, at *2 (C.D. Cal. Feb. 21, 2002). If they are prisoners at war, the captives should be afforded more liberties than they are currently receiving. See *What's News*, WALL ST. J., Jan. 22, 2002, at A1.

235. *Id.*

236. See, e.g., *U.S. v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). Though a suspected terrorist, Timothy McVeigh received a fair trial before being convicted of the bombing of the Oklahoma City federal building in 1998.

237. Qu Arlen Specter, *Questioning the President's Authority*, N.Y. TIMES, Nov. 28, 2001 (quoting President George W. Bush).

238. E.g., Robin Toner, *Civil Liberty Vs. Security: Finding a Wartime Balance?* N.Y. TIMES, Nov. 18, 2001, at A1 (defending President Bush's Executive Order, Vice President Dick Cheney proclaimed, "This is a war against terrorism. Where military justice is called for, military justice will be dispensed.").

239. Clyde Haberman, *A Widening Rout, Civil Liberties, A Red Cross Retreat*, N.Y. TIMES, Nov. 15, 2001, (Nation Challenged), at 1.

240. Ashcroft, *supra* note 7.

241. David E. Sanger, *President Defends Military Tribunals in Terrorist Cases: Foe Has Declared War*, N.Y. TIMES, Nov. 30, 2001, at A1.

242. E.g., Cole, *Liberties in a Time of Fear*, N.Y. TIMES, Sept. 24, 2001, at 29 ("Precisely because the terrorists violated all principles of decency and law, we must hold fast to ours."); see also Haberman, *supra* note 238, at 1; Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23 (maintaining that it would do justice to America to see the terrorists tried in public).

Critics also maintain that the Executive Order unacceptably profiles Arab Americans.²⁴³ The power of the executive branch to question and try thousands of Middle Eastern men at special military tribunals may threaten the principle of equality. The American Civil Liberties Union has condemned the Executive Order as a "dragnet approach that is likely to magnify concerns of racial and ethnic profiling."²⁴⁴

Congress is also concerned that the Executive Order gives too much power to the President. Even conservative congressmen have expressed dissatisfaction that Congress was not made party to the drafting of the Executive Order.²⁴⁵ Civil libertarians fear that the new system will weaken the institution of checks and balances.²⁴⁶ Republican senators, including Arlen Specter of Pennsylvania, maintain that the administration has not conclusively demonstrated a need to change the rules so drastically.²⁴⁷ Senator Specter argues that the involvement of Congress and the courts is necessary to respond to terrorism in a way that will safeguard civil liberties.²⁴⁸

IV. WHAT KIND OF DEMOCRACY SHOULD THE NATION EMBRACE?

In the midst of this debate is the crucial question of what kind of democracy the nation should embrace in the aftermath of the terrorist attacks on September 11, 2001. President Bush's Executive Order establishing military tribunals to try suspected terrorists arguably resembles Executive Order 9066, in which Franklin D. Roosevelt authorized the removal of ethnic Japanese from the West Coast.²⁴⁹

243. Safire, *supra* note 220, at A31; *see also A Travesty of Justice*, N.Y. TIMES, Nov. 16, 2001, at A24 (suggesting that the Executive Order signals "a lack of confidence in the case against the terrorists and in the nation's democratic institutions.").

244. *E.g.*, Haberman, *supra* note 238, at 1.

245. Elisabeth Bemiller & David Johnston, *Bush Sets Option of Military Trials in Terrorist Cases: Al Qaeda is the Target*, N.Y. TIMES, Nov. 14, 2001, at B8 (evaluating President Bush's plan to try suspected terrorists in secret tribunals).

246. *See* Neil A. Lewis, *Justice Dept. and Senate Clash Over Bush Actions*, N.Y. TIMES, Nov. 29, 2001, at B7 (describing Republican Senator Arlen Specter's discontent that Congress was not consulted).

247. *E.g.*, Safire, *supra* note 220, at A31.

248. *See* Specter, *supra* note 236.

249. *Id.*

A. Constitutional Democracy and Representative Democracy Will Not Work

September 11 may simply be another chapter in the debate between defending our country and safeguarding our civil liberties during times of crisis.²⁵⁰ Many have argued for a constitutional democracy approach to the threat of terrorism. For Dworkin and Brennan, the judiciary is in the best position to interpret the Constitution.²⁵¹ Rather than defer to the majority, the government should safeguard the rights of all citizens, including Arab Americans.

Many have acknowledged the importance of protecting Americans on their own soil.²⁵² Some have warned, however, that we must not “sacrifice our constitutional commitments to freedom”²⁵³ and that we should learn from *Korematsu*.²⁵⁴ Though the issues that will arise, and the problems that are likely to develop, as a result of this terrorism crisis will be new and different, the fundamental guarantees of our Constitution—security and liberty—still remain the same.²⁵⁵

Ultimately, however, a constitutional democracy approach will not work. The events of September 11 differ from the events of the post World War II era in several ways. First, terrorism presents a threat that is different from any other threat that the United States has encountered.²⁵⁶ Though the ultimate objective of terrorism is political,²⁵⁷ the enemy implements its goals by destruction.²⁵⁸ Unlike traditional warfare, the enemy is not easily identifiable. It is a

250. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). See also Toner, *supra* note 237, at B6 (recounting President Roosevelt’s internment of Japanese-Americans during World War II, as well as tribunals established during World War II that tried German saboteurs).

251. See, e.g., Toobin, *supra* note 212 at 57.

252. See *supra* Part I.A.

253. See *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); Cole, *supra* note 241, at 29; David Garrow, *Another Lesson From World War II Internments*, N.Y. TIMES, Sept. 23, 2001 (Week in Review), at 6. Garrow warns that a “loaded weapon” still stands ready to be abused by those in power. *Id.* These historical lessons should teach us that government crackdowns based solely upon race or ethnicity are wrong. Further, the reluctance of the judiciary to get involved is dangerous. Linda Greenhouse, *Will the Court Reassert National Authority?* N.Y. TIMES Sept. 20, 2001, at 14 (discussing Mary Dudziak’s warning that judges should establish new principles rather than rely on possibly outdated precedents).

254. *Id.*

255. *Id.*

256. Cole, *supra* note 241.

257. Ashcroft, *supra* note 7, at 16 (indicating that our laws are ill-equipped to face the threat of terrorism).

war waged by individuals, and suspects do not always fit a specific profile.²⁵⁹ This makes an effective response all the more difficult.²⁶⁰

Further, civilians' lives are at stake.²⁶¹ As horrible as it was, the attack at Pearl Harbor was an attack on our military base.²⁶² It was a statement of military power.²⁶³ The terrorist attacks of September 11, on the other hand, were targeted at random, innocent civilians.²⁶⁴ The victims were not people in the military who had volunteered to risk their lives to defend their country. Rather, they were an assortment of blue and white collar civilian workers.

Lastly, the threat of an attack on American soil has never been so great. Though terrorism has been a threat for decades,²⁶⁵ previous attacks were made on foreign soil.²⁶⁶ The frequency and severity of terrorist attacks in the past decade²⁶⁷ have not alarmed most American citizens.²⁶⁸ Americans are now more concerned that the government will fail to prevent terrorism than they are that the government will infringe upon civil liberties.²⁶⁹

As a result of these differences, some commentators have espoused representative democracy as the best response to Septem-

258. HEYMANN, *supra* note 4, at xi. For example, Muslim fundamentalists are often motivated by their hatred for all things American, both cultural and economic. *Id.* at x.

259. As President Bush said in his address to the nation on September 20, 2001, , "The enemy lurks in our shadows." Bush, *supra* note 8. In contrast to the attack on Pearl Harbor, no one has taken responsibility for the September 11 terrorist acts. *See also* A.L. DeWitt, *The Ultimate Exigent Circumstance*, 5 KAN. J.L. & PUB. POL'Y 169 (1996) (suggesting that the biggest threat to our country is one from within our borders).

260. *See* Bush, *supra* note 8.

261. *Id.* Though the internment of Japanese and Japanese Americans during World War II was unjustified, it was at least "a declared war, with identified enemies." *Id.* In contrast, terrorist suspects are harder to identify. *Id.*

262. *Id.* ("[P]erhaps no threat to our constitutional form of government looms as large as that posed by terrorist acts that are directed at domestic civilian targets during peacetime.").

263. Kmiec, *supra* note 23 (labeling the terrorist acts of September 11 as a "random manifestation of hate intended to spread panic and fracture the civil order and continuation of American society").

264. *Id.*

265. *Id.* (noting that the attacks of September 11 were "simply the random manifestation of hate intended to spread panic and fracture the civil order and continuation of American society").

266. HEYMANN, *supra* note 4, at 154 (noting that the threat of terrorism has existed for years and will never be entirely abolished).

267. *Id.* at 1. According to the F.B.I., there were only two international terrorist incidents on U.S. soil from 1985-95. *Id.*

268. *See supra* note 6.

269. *Id.*

ber 11. Though Thayer and Bickel recognize that the Court has the authority to determine what is just, they argue that the legislature and executive are best equipped to handle crisis situations.²⁷⁰

This vision of the legislature as the interpreter of the Constitution²⁷¹ has been realized by theorists in the wake of September 11. Douglas Kmiec, for example, argues that elected officials should remedy the wrong that was committed against innocent civilians.²⁷² In his view, the PATRIOT Act is a successful balance between law enforcement and civil liberties.²⁷³ According to Kmiec, our distrust in humanity should not be displaced onto elected officials; we must allow them to do their job.²⁷⁴

Yet, many argue that *Korematsu* demonstrates the weaknesses of representative democracy.²⁷⁵ Although reparations have been paid to the Japanese, the decision has never been overruled.²⁷⁶ Black and Frankfurter's deference to the other branches of government, therefore, is still constitutional doctrine.²⁷⁷

The majority in *Korematsu* found that Congress and the Executive acted within constitutional boundaries.²⁷⁸ But what if the Court had found to the contrary? Thayer proposes that, even if the answer to the "clear mistake doctrine" is negative, the political process will ensure that adverse legislators are voted out of office.²⁷⁹ But in an emergency situation, there may not be enough time to wait. Though *Korematsu* held that a restriction on civil liberties is constitutional, Thayer's recommendation to leave such decisions up to the political process is bound to fail in the future. And the future may be now.

As indicated by the debate surrounding the PATRIOT Act and Bush's Executive Order,²⁸⁰ many constitutional issues will arise as

270. See Pew Research Center: Pew Research Ctr., *American Psyche Reeling From Terror Attack* (2001).

271. See *supra* Part I.A.2.

272. See *supra* notes 47-49 and accompanying text.

273. See Kmiec, *supra* note 23.

274. *Id.*

275. *Id.* See also Toner, *supra* note 197, at 14 (indicating that Americans do in fact trust government to respond appropriately to September 11).

276. See *supra* notes 156-190 and accompanying text.

277. Congress enacted a reparations bill in 1948, partially acknowledging its mistake and offering small economic compensation. 50 App. U.S.C.A. §1981 (1948). In the mid-1980s, the convictions of both *Korematsu* and *Hirabayashi* were erased. MURPHY, FLEMING & BARBER, *supra* note 13, at 100.

278. See *supra* notes 137-153 and accompanying text.

279. See *supra* note 141. This determination answered affirmatively Thayer's "clear mistake" test. See *supra* note 51.

280. See *supra* note 50 and accompanying text.

a result of the September 11 events. One lesson from September 11 is that we cannot wait for something to go wrong. Whether it is terrorism or the tramping of civil liberties, we must take measures to prevent its occurrence.

B. Deliberative Democracy Is the Solution

As Cass Sunstein suggests, we must seize the opportunity that our democracy allows us.²⁸¹ We must discuss and debate these issues as part of a deliberative democracy.²⁸² As such, legislators and citizens alike should deliberate about the common good above and beyond the clashing of personal interests.²⁸³

People must face this new situation with the confidence that they have the ability to make a change. We cannot wait for the court, or even Congress, to make a decision. Political commentators have approached September 11 with such confidence.²⁸⁴ The PATRIOT ACT and the Order are under constant scrutiny, precisely what Sunstein had in mind.

Moreover, this scrutiny may be why, in the months following September 11, the barks have been worse than the bites. Even though Bush and Ashcroft's initial proposals instilled fear in the minds of thousands, the feared results have not been realized. For example, despite criticism that the prisoners held at Guantanamo Bay have not been treated well, Secretary of Defense, Donald Rumsfeld, maintains that their treatment is appropriate.²⁸⁵ Furthermore, the Eastern District of Virginia commenced a fair trial process against John Walker Lindh, an American citizen who became a fighter for the Taliban at the age of eighteen.²⁸⁶ Even

281. *See supra* Part III.A and III.B.

282. SUNSTEIN, *supra* note 87, at 133.

283. *Id.*

284. *Id.* at 135. Attempting to synthesize liberalism and republicanism, Sunstein suggests that deliberative democracy should limit the role of courts in deciding certain issues. Rather, such issues should be left to the citizenry: "For this reason it seeks to ensure that political outcomes benefit from widespread participation by the citizenry." *Id.*

285. *See, e.g.,* Cole, *supra* note 241; Etzioni, *supra* note 200; Safire, *supra* note 220; Toner, *supra* note 197; Toobin, *supra* note 212; Tribe, *supra* note 23.

286. *See, e.g.,* Jess Bravin, Jackie Calmes & Carla Anne Robbins, *Status of Guantanamo Bay Detainees Is Focus of Bush Security Team's Meeting*, WALL ST. J., Jan. 28, 2002, at A16 (noting that Rumsfeld has labeled the detainees' status as "unlawful combatants" and justified their harsh treatment by stating that they are "among the most dangerous, best-trained vicious killers on the face of the earth"). *But see* Michael Byers, *Ignore the Geneva Convention and Put Our Own Citizens at Risk*, HUMANIST, Mar. 1, 2002, at 33 (advocating that the detainees be treated as prisoners of war in accordance with the Geneva Convention). Byers' description of the detain-

Zacarias Moussaoui, the first man to be charged in the September 11 attacks, is receiving a trial in civil court.²⁸⁷

Furthermore, in line with Sunstein's theory, people recognize that the status quo may not be neutral.²⁸⁸ For example, some are unhappy with the amended FISA requirement which now enables authorities to obtain warrants so long as a "significant purpose" of the surveillance is to obtain foreign intelligence information.²⁸⁹ This leaves open the possibility that other purposes may affect the decision of whether to issue a warrant or not. As a result, many may fear race or ethnicity to factor into the decision. But who determined that the original requirement of "primary purpose" was just? Perhaps a "significant purpose" is a better requirement. Perhaps such changes in our civil liberties are not what Sunstein had in mind when he wrote about a deliberative democracy. In other words, even though the legislation has altered our rights, this may be necessary given the current situation. Regardless, it is this type of debate that Sunstein had in mind when he wrote about a deliberative democracy.

In so doing, deliberative democracy will guarantee that certain commitments to liberty are sustained, while at the same time, allowing the citizenry to arrive at the best conclusion.²⁹⁰ Sunstein recognizes that judicial protection of rights alone will not produce the best outcome.²⁹¹ All three branches of government, as well as the citizenry, should play an active role in formulating an effective response to terrorism.²⁹² By embracing the debate between constitutional and representative democracy,²⁹³ the President, Congress

ees' being "chained, manacled, hooded, even sedated, their beards shorn off against their will. . . ." has incited many civil rights groups to protest this treatment. See, e.g., Tod Lindberg, *About Those Detainees; The Administration's Legal Reasoning is Open to Question (But Closed to Scrutiny)*, THE WEEKLY STANDARD, Feb. 11, 2002, at 17 (noting the discontent of the American Civil Liberties Union and Human Watch with the actions of the Bush Administration).

287. *United States v. John Phillip Walker Lindh*, 2002 Extra Lexis 265.

288. Michael Isikoff, *Should This Man Die?* NEWSWEEK, Apr. 8, 2002, at 30.

289. See *supra* notes 89-92 and accompanying text.

290. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 218, 15 Stat. 272.

291. *Id.*

292. *Id.* at 134. Political outcomes "are to be produced by an extended process of deliberation and discussion, in which new information and new perspectives are brought to bear." *Id.*

293. *Id.* at 347; see also Kmiec, *supra* note 23, at 57 (indicating that Congress and the President have the authority to combat terrorism); Cole, *supra* note 10, at 30 (maintaining that "passing the buck to the judges nurtures the undemocratic myth that courts are the sole custodians of constitutional truth"); Albert R. Hunt, *Govern-*

and Court, together with an active citizenry, can redraw the line between civil liberties and national security.²⁹⁴

CONCLUSION

On September 10, 2001, most Americans did not think twice before leaving their homes in the morning. They rode the subways, went to work, ascended to the top floors of their office buildings and returned home to watch baseball and sitcoms—all without a second thought. The biggest issues in the news were the disappearance of Washington intern Chandra Levy and Elizabeth Dole's decision to battle Jesse Helms in the race for senator of North Carolina.

All of that changed on September 11. Americans stopped taking every aspect of their lives for granted. Parents started giving their children one extra hug before dropping them off at school. People now take a few minutes out of their busy lives to call friends and make plans to catch up on lost time. All the while, American pride has resurfaced.

Such a sense of patriotism has not existed in this country for decades.²⁹⁵ At the same time, a newfound fear pervades every aspect of life. Americans are more understanding of terrorist activities in other areas of the world because now, they too, are visible targets of hate.²⁹⁶

As our government tries to maintain a balance between civil liberties and national security, citizens must maintain an active voice. In the word of Justice Learned Hand, "Liberty lives in the hearts and minds of men and women; when it dies there, no Constitution, no law, no court can save it."²⁹⁷ Learned Hand acknowledged that our democracy is worth little without an active citizenry.²⁹⁸

ment to the Rescue, RESPONSIVE COMMUNITY, Winter 2001-02, at 84, 86 (suggesting that Congress and the media play a larger role than the Court in effecting a response to terrorism).

294. *Supra* Part I.

295. Sunstein recognizes that the legislature cannot be relied upon alone because it does not always represent the will of the people. *See* SUNSTEIN, *supra* note 281, at 125. However, political deliberation between the branches is an integral part of the system of checks and balances which makes our society work. *Id.* at 135. "It is connected with the American belief that disagreement and heterogeneity are creative forces, indispensable to a well-functioning republic." *Id.*

296. Putnam, *supra* note 197, at 36. Seventy-seven percent favor the use of military action even if it involves thousands of casualties. *Supra* note 269.

297. *See* Ashcroft, *supra* note 7.

298. Jeffrey Rosen, *What Price Security: Testing the Resilience of American Values*, N.Y. TIMES, Nov. 25, 2001, at 4 (quoting Justice Learned Hand's analysis of American's ability to hold onto their liberties in times of crisis).

This notion is especially important today. On September 11, 2001, the nation embarked upon a new era, one that neither the presidency, Congress, nor the Court has ever encountered.²⁹⁹ As Lawrence Tribe stated, "With or without a Supreme Court steadfastly dedicated to the civil rights and liberties, each of us must follow an inner compass that points to the Constitution's true north."³⁰⁰ We cannot rely on any one institution to save this country from ruin.³⁰¹ We must all work together to defend our country and our Constitution.

299. *Id.*

300. Tribe, *supra* note 23, at 31.

301. *Id.*

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